

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

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No. 655.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HERMAN F. GARBISH.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF LOUISIANA.

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a The United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, }  
*vs.* } No. 2648.  
 HERMAN F. GARBISH, DEFENDANT IN ERROR.

Charlton R. Beattie, esq., United States district attorney, for the United States of America, plaintiff in error.

Saunders, Dufour & Dufour, esqs., attorneys for defendant in error.

Writ of error to the Circuit Court of the United States for the Eastern District of Louisiana, New Orleans Division, from the Supreme Court of the United States, returnable within thirty (30) days from the fourteenth (14th) day of July, A. D. 1910, at the city of Washington, District of Columbia.

Transcript of record.

1 [Extract from the minutes.]

*Finding a true bill.*

NEW ORLEANS, *Friday, July 16, 1909.*

Court met pursuant to recess.

Present: Hon. Rufus E. Foster, district judge.

The grand jury having been adjourned to this day, the following members appeared and answered to their names, to wit:

- |                               |                         |
|-------------------------------|-------------------------|
| 1. H. H. Flaspoller, foreman. | 11. O. E. Hill.         |
| 2. A. J. Larrien.             | 12. Henry E. Mehrtens.  |
| 3. Henry Chalaron.            | 13. J. L. Pollet.       |
| 4. George Scratchley.         | 14. August Bowman.      |
| 5. V. G. Walne.               | 15. M. J. Ogden.        |
| 6. Cartwright Eustis.         | 16. Achille J. Populus. |
| 7. Charles Ammen.             | 17. W. C. Williams.     |
| 8. W. D. Gardiner.            | 18. George H. Wasson.   |
| 9. John G. Ross.              | 19. H. W. Buckner.      |
| 10. Joseph M. Gore.           |                         |

And thereupon the grand jury retired to their room to deliberate upon such matters as might be laid before them for investigation.

After deliberation upon such matters as were laid before them for investigation the grand jury returned into court, and then and there in open court returned the following indictment, which finding was ordered to be recorded, to wit:

#### Indictment.

THE UNITED STATES OF AMERICA }  
*vs.* } No. 2648.  
 HERMAN F. GARBISH.

27 Statutes at Large, 340.

A true bill.

New Orleans, July 16th, 1909.

HENRY H. FLASPOLLER, *Foreman.*

*Indictment filed July 16, 1909.*

United States Circuit Court, Eastern District of Louisiana.

THE UNITED STATES OF AMERICA	} No. 2648.
<i>vs.</i>	
HERMAN F. GARBISH.	

UNITED STATES OF AMERICA,

*Eastern District of Louisiana, New Orleans Division.*

In the Circuit Court of the United States in and for the district aforesaid, at the April term thereof, A. D. 1909, the grand jurors impaneled, sworn, and charged at the term aforesaid, on their oaths present that Herman Garbish, in the parish of St. James, State of Louisiana, in the Eastern District of Louisiana, New Orleans division thereof, and within the jurisdiction of this court, on the 17th day of August, in the year of our Lord one thousand nine hundred and eight, being then and there a contractor upon public works of the United States, to wit, the building and construction of public levees upon the banks of the Mississippi River in the parish of St. James aforesaid, and upon the levee known as the "Union levee," being built and constructed upon "Union" plantation, in the parish of St. James aforesaid, did unlawfully, wrongfully, intentionally, and knowingly require and permit the laborers, whose services it was his, the said Garbish's, duty to employ, direct, and control, and whose services were directed, employed, and controlled by him, the said Garbish, in the building and construction of said levee, which was then and there a part of the public works of the United States, to work more than eight hours in one calendar day, to wit, the 17th day of August, 1908, at a time and under circumstances when there was no extraordinary emergency, for the reason that at that season of the year, to wit, during the months of August, September, October, and November and December the waters of the Mississippi River annually fall below the level of the surrounding land and are retained within the banks of said river without the necessity of any artificial levees, as was true on August 17, 1908, and for the

3 further reason that the said Union levee, upon which the said work was permitted and required, was being constructed in the ordinary and usual course of levee building and improvements carried on annually by the Government of the United States for the increase in size and strength of such levees, in preparation for the high waters that come down the river; the existing levees in places being found of a standard sufficient in size and strength to withstand all usual yearly high stages of the water in the said river, but too low in size and strength to retain safely the unusually high waters that occasionally, although not every year, come down the Mississippi River, and it being the policy, rule, and custom of the United States Government to thus increase the standard of levees by destroying each year some of the



inferior levees and replacing them with new and stronger and higher levees, year by year, until the levees shall have all been brought to a standard able to withstand any unusual floods that may come down the river; and nothing unusual or out of the ordinary having required the destruction of the old levee on Union plantation or the building of this new levee, but same having been done for the reasons and pursuant to the policy aforesaid, and there, then and there, being the usual time for said contractors to complete said levee, so as to allow it time to settle and pack and become ready and able to serve the purposes for which it was constructed, namely to withstand and retain the high waters of the Mississippi River before the usual annual rise of the waters in said river, and there, then and there, being the same usual and customary time to so complete and perfect said Union levee, before the usual annual rise of the waters in said river, as would exist in the construction of any levee, on the said river any year and at any place and by any contractor, all of whom know, as did the said Garbish, that the waters of the Mississippi River annually fall and are retained within the natural banks thereof during the period or season aforesaid, and begin to rise above the natural banks thereof, and therefore to need artificial levees to retain them, in the month of January each year; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States.

(Signed) CHARLTON R. BEATTIE,  
U. S. Attorney.

(Endorsed on reverse:)

[No. 2648. United States Circuit Court, Eastern District of Louisiana, New Orleans Division. The United States of America vs. Herman F. Garbish. Indictment. 27 Statutes at Large, 340. A true bill, New Orleans, July 16th, 1909. Henry H. Flaspoller, foreman. Filed this 16 day of July, A. D. 1909. H. J. Carter, clerk.]

5 *Demurrer filed January 12, 1910.*

United States Circuit Court, Eastern District of La.

UNITED STATES	} No.
<i>vs.</i>	
HERMAN GARBISH.	

Now comes the defendant, Herman Garbish, through his undersigned attorneys, and demurs to the indictment herein, and says:

That said indictment does not set forth any offense against the laws of the United States or any violation of the laws of the United States, and that this demurrer should be sustained and the defendant hence dismissed.

(Signed) SAUNDERS, DUFOUR & DUFOUR,  
*Attys. for Defendant.*

January 12, 1910.

[Extract from the minutes.]

*Hearing upon demurrer and submission.*NEW ORLEANS, *Friday, January 14, 1910.*

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, district judge.

UNITED STATES	}	No. 2648.
<i>vs.</i>		
HERMAN F. GARBISH.		

This cause came on to be heard upon the demurrer filed by the defendant on January 12th, 1910.

Present: E. D. Saunders, of counsel for defendant; Charlton R. Beattie, United States attorney.

And was argued and submitted—when the court took same under consideration.

[Extract from the minutes.]

*Order sustaining demurrer, quashing indictment, and discharging defendant.*NEW ORLEANS, *Monday, June 27, 1910.*

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, district judge.

UNITED STATES	}	No. 2648.
<i>vs.</i>		
HERMAN F. GARBISH.		

This cause came on to be heard at a former day upon the demurrer of defendant to the indictment herein and was argued by counsel for the respective parties and submitted.

Whereupon and on due consideration thereof and for the written reasons of the court on file, it is ordered by the court that the said demurrer of defendant to the indictment herein be sustained and the indictment quashed and defendant be discharged.

*Opinion filed June 27, 1910.*

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES	}	No. 2648.
<i>vs.</i>		
HERMAN F. GARBISH.		

In this case the defendant was indicted for an alleged violation of the act of August first, 1892, known as the eight hour law, and

has interposed a general demurrer to the indictment, on the ground that it does not set forth an offense against the laws of the United States.

The demurrer, of course, admits all the facts properly pleaded, but does not admit the correctness of either the inferences drawn from them by the pleader or his conclusions of law.

Stripped of surplusage, the indictment charges that on August 17, 1908, the defendant, a contractor, was engaged in building certain public levees on the banks of the Mississippi River in the parish of St. James, Louisiana, and required and permitted the laborers employed by him and engaged in the said work to work more than eight hours in one calendar day.

The indictment further sets up that during the months of August, September, October, November, and December the waters of the Mississippi River annually fall below the level of the surrounding land and are retained within its banks without the necessity of artificial levees; that the work was being done in the ordinary and usual course of levee building, by the Government of the United States, in preparation for the high waters that annually come down the river; that the existing levee was not of sufficient size and strength and did not comply with the government standard and was being destroyed and replaced by the new, higher, and stronger levee; that nothing unusual or out of the ordinary had required the destruction of the old levee or the building of the new levee, and that the contractor had the usual time to complete the levee so as to allow it to settle and pack and become ready to withstand the next annual rise of the river.

9 The defendant rests his case on the proposition that the building of levees on the Mississippi River in the Eastern District of Louisiana at all times presents an extraordinary emergency, and hence that particular work is exempted from the operation of the law.

This is denied by the Government, and the indictment contains the general averment that no extraordinary emergency existed.

The question thus squarely presented is decisive of the case, if defendant's contention be sustained.

The building of levees in Louisiana has at all times presented many problems. It is absolutely necessary, not only for the preservation of property and to permit the cultivation of the land, but to safeguard the very lives of the inhabitants as well, that levees should be built on the banks of the Mississippi River in this locality; therefore it has always been usual that levee work proceed with the greatest despatch, and the labor of the day has never been restricted to eight hours.

In the nature of things, it is impossible to employ an unlimited number of men or teams in the building of levees, as no matter how great a force the contractor may assemble, the work will not permit of crowding. It is necessary that levees be built in as short a time as possible, in order that they may settle as much as they can and

that the grass may become well rooted upon them before they are called upon to bear the strain of a high river.

It is true that the months of August, September, October, November, and December are the most favorable for levee building, but there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank full, necessarily no levees can be built. Statistics of the river's height at New Orleans show that during the past twenty-five years the river has been bank full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An

10      unprecedented rain or an early freeze followed by a thaw anywhere in the valley of the Mississippi River or its tributaries might unexpectedly cause the river to rise at New Orleans. No one can forsee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might signally fail.

All of these facts are within the common knowledge of the people of this district, and, in connection with the specific allegations of facts in the indictment, overcome the mere conclusion of the pleader that no extraordinary emergency existed.

The case presented here is not that of a contractor trying to complete his job on schedule time, nor is it a question of expediency or the saving of expense. In my opinion, the building of levees on the banks of the Mississippi River in the Eastern District of Louisiana presents at all times an extraordinary emergency.

It may be that the indictment is otherwise demurrable, but I prefer to base my decision on the broad ground above set forth.

The demurrer will be sustained and the defendant discharged.

11      *Motion for writ of error filed June 30, 1910.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES	}	No. 2648.
<i>versus</i>		
HERMAN F. GARBISH.		

On motion of the United States herein appearing by Charlton R. Beattie, United States attorney, and on suggesting error to the prejudice of the United States in the judgment rendered in this case on the 27th day of June, 1910, sustaining the demurrer filed in this case by the defendant and on further suggesting the assignment of errors herein filed,

It is ordered that a writ of error be granted the United States returnable within thirty days from this date to the Supreme Court of the United States at Washington, D. C., and that the said writ of

error act as a supersedeas and the United States be dispensed from giving bond on said writ of error.

(Signed)

RUFUS E. FOSTER, *Judge*.

June 30/10.

12 *Assignment of errors filed nunc pro tunc as of date June 30, 1910.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES OF AMERICA	} No. 2648.
<i>versus</i>	
HERMAN F. GARBISH.	

#### ASSIGNMENT OF ERRORS.

Now comes the United States in this case praying for a writ of error, and assigns the following errors in the proceedings, judgment, and decree of the trial court in this case sustaining the demurrer of the defendant:

#### I.

The trial court erred in sustaining the demurrer to the indictment filed by the defendant.

#### II.

The court erred in not overruling and setting aside the demurrer filed by the defendant.

#### III.

The court erred in its construction of the statute upon which the indictment in this case is founded, and particularly in its construction of the words "extraordinary emergency," used in such statute, and in holding, under its erroneous construction of these words, that the indictment on its face does not show an absence of "extraordinary emergency."

#### IV.

The court erred in its construction of the statute upon which this indictment is founded, and particularly in its construction of the words "extraordinary emergency," as used in said statute, and in not holding that the facts set forth in the indictment in this case showed, under a proper construction of the statute and the words "extraordinary emergency" as used therein, the commission of a criminal violation by the defendant of the said statute; and, further, in not holding that the facts set forth in the indictment in this case

showed that there was no "extraordinary emergency," as intended by the said statute, and such as to excuse the defendant for permitting, requiring, and directing the laborers employed by him and under his control to work more than eight hours in one calendar day.

And for these errors and others apparent on the face of the record the United States of America prays that the said judgment of June 27, 1910, be reversed, and the case remanded for such other proceedings as may be proper, and that such other and further orders may be rendered as may be just.

(Signed)

CHARLTON R. BEATTIE,  
*U. S. Attorney.*

14 The United States of America, Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Henry J. Carter, clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, do hereby certify that the foregoing 13 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of the United States of America vs. Herman F. Garbish, No. 2648 of the docket of the said court, together with the assignment of errors.

Witness my hand and the seal of said court, at the city of New Orleans, this 20th day of July, A. D. 1910.

[SEAL.]

H. J. CARTER, *Clerk.*

15 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding sessions for the Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States, plaintiff, and Herman F. Garbish, defendant, in the suit entitled, United States vs. Herman F. Garbish, No. 2648, of the criminal docket of said court a manifest error hath happened to the great damage of the said The United States as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of

right, and according to the laws and customs of the United States, should be done.

Witness, the honorable John M. Harlan, associate justice of the said Supreme Court of the United States, this 14 day of July, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

H. J. CARTER.

*Clerk of the United States Circuit Court  
for the Eastern District of Louisiana.*

(Indorsed:) United States Circuit Court. No. 2648. United States versus Herman F. Garbish. Writ of error. Filed July 14, 1910. H. J. Carter, clerk.

16 The United States of America. Circuit Court of the United States. Eastern District of Louisiana.

The President of the United States to Herman F. Garbish, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within thirty days from date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein the United States is plaintiff in error and Herman F. Garbish is defendant in error, to show cause, if any there be, why the judgment rendered against the said The United States as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable John M. Harlan, associate justice of the United States, this 14th day of July, in the year of our Lord one thousand nine hundred and ten.

[SEAL.]

(Signed)

RUFUS E. FOSTER, *Judge.*

CLERK'S OFFICE.

A true copy of the original.

New Orleans, La., July 19th, 1910.

H. J. CARTER, *Clerk.*

17 Received by U. S. marshal, New Orleans, La., July 19/10.

On this 19th day of July, 1910, before the undersigned authority, personally appeared E. M. Kinler, D'y U. S. marshal for the Eastern District of La., known to me as such, who, being duly sworn, deposes and says that he, affiant, did on the 19th day of July, 1910, serve this citation on Herman F. Garbish, by handing the original, of which this is a certified copy, to W. C. Doufour, a member of the law firm of Saunders, Dufour and Dufour, in person in New Orleans, La.

E. M. KINLER.

Sworn to and subscribed before me on this 19th day of July, 1910.

[SEAL.]

H. J. CARTER, *U. S. Commissioner.*

Service of the original citation, of which the within is a certified true copy, is hereby accepted for Herman F. Garbish, said service having this 19th day of July, 1910, been made upon me in person by the U. S. marshal, I being one of the attorneys of record of said Garbish.

WM. C. DUFOUR,  
FOR SAUNDERS, DUFOUR & DUFOUR,  
*Att's of Record.*

(Indorsed:) Return. United States Circuit Court. Eastern District of Louisiana. No. 2648. The United States vs. Herman F. Garbish. Citation of appeal. Marshal's return. No. —. U. S. Circuit Court, Eastern District of Louisiana, New Orleans division. Filed Jul. 19, 1910. H. J. Carter, clerk.

(Indorsement on cover:) File No. 22276. E. Louisiana. C. C. U. S. Term No. 655. The United States, plaintiff in error, vs. Herman F. Garbish. Filed July 26th, 1910. File No. 22276.





# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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THE UNITED STATES, PLAINTIFF IN ERROR,	} No. 655.
v.	
HERMAN F. GARBISH.	

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*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF LOUISIANA.*

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## MOTION TO ADVANCE.

The defendant in error was indicted in the Circuit Court of the United States for the Eastern District of Louisiana on July 16, 1909, charged with a violation of the act of August 1, 1892 (27 Stats., 340), known as the eight-hour law, in that on August 17, 1908, while engaged as a contractor in building certain public levees on the banks of the Mississippi River in the parish of St. James, La., he required and permitted the laborers employed by him, engaged in said work, to work more than eight hours in one calendar day. A demurrer was filed and the defendant rested his case on the proposition that the building of levees on the Mississippi River in the Eastern District of Louisiana at all times presents an "extraordinary emer-

gency," and hence that particular work is exempt from the operation of the law. The court sustained the demurrer and discharged the defendant.

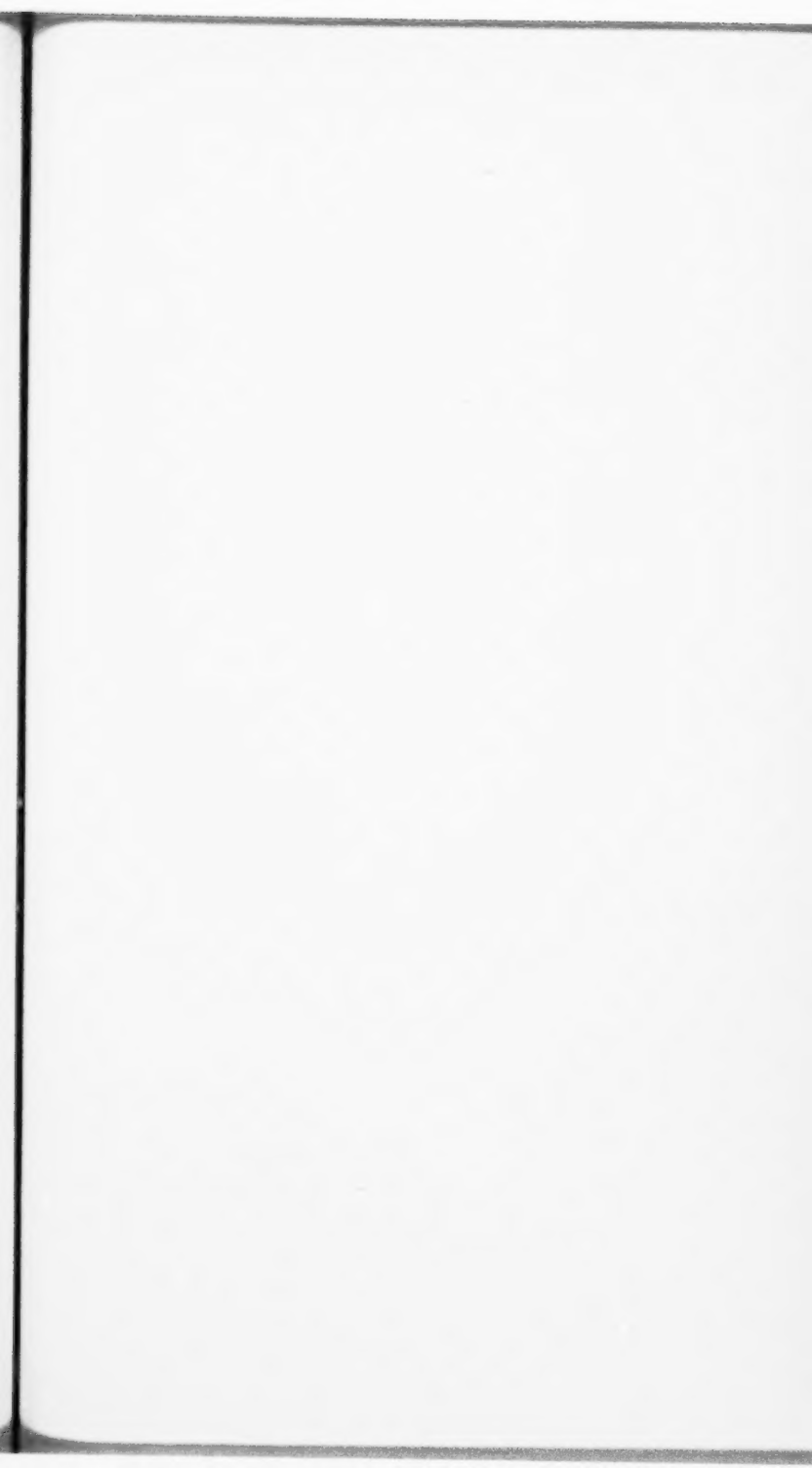
The case was brought here under the criminal appeals act, in accordance with which the Solicitor General moves the court to advance the case on the docket and set it down for hearing on some day convenient to the court during the October term, 1911.

Notice of this motion has been served upon opposing counsel.

FREDERICK W. LEHMANN,  
*Solicitor General.*

APRIL, 1911.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

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THE UNITED STATES, PLAINTIFF IN	} No. 362.
error,	
v.	
HERMAN F. GARBISH.	

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*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF LOUISIANA.*

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**STATEMENT, BRIEF, AND ARGUMENT FOR THE UNITED  
STATES.**

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## **THE CASE.**

This is a writ of error to review a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, sustaining a demurrer to an indictment charging a violation of the act of August 1, 1892, chapter 352 (27 Stat., 340). This act provides:

That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of

the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency.

Garbish, the defendant, was a contractor for the construction of what was known as the Union Levee, which was being built upon the Union plantation in St. James Parish in the Eastern District of Louisiana.

#### THE INDICTMENT.

The indictment charged in proper form that Garbish had violated the law in that he had permitted and required his employees who were engaged in building the levee to work more than eight hours during the calendar day of August 17, 1908, when there was no extraordinary emergency.

The indictment set out that there was no extraordinary emergency—

for the reason that at that season of the year, to wit, during the months of August, September, October, and November and December the waters of the Mississippi River annually fall below the

level of the surrounding land and are retained within the banks of said river without the necessity of any artificial levees, as was true on August 17, 1908, and for the further reason that the said Union levee, upon which the said work was permitted and required, was being constructed in the ordinary and usual course of levee building and improvements carried on annually by the Government of the United States for the increase in size and strength of such levees, in preparation for the high waters that come down in the river; the existing levees in places being found of a standard sufficient in size and strength to withstand all usual yearly high stages of the water in the said river, but too low in size and strength to retain safely the unusually high waters that occasionally, although not every year, come down the Mississippi River, and it being the policy, rule and custom of the United States Government to thus increase the standard of levees by destroying each year some of the inferior levees and replacing them with new and stronger and higher levees, year by year, until the levees shall all have been brought to a standard able to withstand any unusual floods that may come down the river; and nothing unusual or out of the ordinary having required the destruction of the old levee on Union plantation or the building of this new levee, but same having been done for the reasons and pursuant to the policy aforesaid, and there, then and there, being the usual time for said contractors to complete said levee, so as to

allow it time to settle and pack and become ready and able to serve the purposes for which it was constructed, namely to withstand and retain the high waters of the Mississippi River before the usual annual rise of the waters in said river, and there, then and there, being the same usual and customary time to so complete and perfect said Union levee, before the usual annual rise of the waters in said river, as would exist in the construction of any levee, on the said river any year and at any place and by any contractor, all of whom know, as did the said Garbish, that the waters of the Mississippi River annually fall and are retained within the natural banks thereof during the period or season aforesaid, and begin to rise above the natural banks thereof, and therefore to need artificial levees to retain them, in the month of January each year. (R., 2, 3.)

#### **THE DEMURRER.**

The defendant demurred on the ground "that said indictment does not set forth any offense against the laws of the United States or any violation of the laws of the United States." (R., 3.)

As stated by the Circuit Court, the defendant based his demurrer on the proposition that—

the building of levees on the Mississippi River in the Eastern District of Louisiana at all times presents an extraordinary emergency, and hence that particular work is exempted from the operation of the law. (R., 5.)

## PROPOSITION.

The usual and ordinary work of constructing levees upon the Mississippi River in the Eastern District of Louisiana does not constitute an extraordinary emergency within the meaning of the act.

*Ellis v. United States*, 206 U. S., 246;  
*United States v. Sheridan-Kirk Contract Co.*,  
149 Fed. Rep., 809.

## ARGUMENT.

The Circuit Court added to the statute an exception which it does not contain and which the spirit and purpose of the act do not imply but positively exclude. The court makes the law prohibit more than eight hours work in any calendar day by the same man upon any public work, "except in case of extraordinary emergency and in case of work upon a Mississippi levee in the Eastern District of Louisiana."

A break in a levee presents an emergency, but that is not what we are dealing with. We have to do with a work of construction which is continually going on. The Government as a matter of fixed policy and usage is replacing existing levees with new ones which are higher and stronger than the old. There is a usual season for doing this—after the floods have subsided and when no floods are anticipated—a season of duration long enough to permit the replacement being properly done. It involves not the work of a day, but of months, and is a continuous, protracted performance, the conditions of which are foreseen and provided for by contract. The carrying out of this



contract in the manner contemplated from the beginning, the court held, involved an extraordinary emergency, continuing to its completion, excusing and justifying what would otherwise be excessive hours of labor by the men engaged upon it during every day of their period of service.

"Extraordinary" means beyond the common order, out of ordinary course, unusual or exceptional. An emergency is something unexpected, something for which no provision has been made.

If a rise in the Mississippi River may come at any time in the year, and come with such frequency at all times as to be anticipated, the situation presented would be a difficult, but not an extraordinary, one. It might be impossible to deal with, but if susceptible of control, it must be met by some regular plan or system.

The building of levees upon the lower Mississippi is a work of the greatest importance and of absolute necessity. Without it, the cultivation of large areas of fertile land would be impossible, and beyond doubt the work should be prosecuted with diligence and dispatch, but the diligence and dispatch are called for by conditions always prevailing and not by an emergency unexpectedly arising and quickly passing away.

The Circuit Court thus describes the situation (R., 6):

It is true that the months of August, September, October, November, and December are the most favorable for levee building, but

there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank full, necessarily no levees can be built. Statistics of the river's height at New Orleans show that during the past twenty-five years the river has been bank full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An unprecedented rain or an early freeze followed by a thaw anywhere in the valley of the Mississippi River or its tributaries might unexpectedly cause the river to rise at New Orleans. No one can foresee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might signally fail.

All of these facts are within the common knowledge of the people of this district, and, in connection with the specific allegations of facts in the indictment, overcome the mere conclusion of the pleader that no extraordinary emergency existed.

If the stages of the Mississippi River are indeed subjects of judicial notice, the official hydrographs, 1871 to 1907, and 1907 to 1911, may properly be brought to the attention of the court, that its knowledge may be definite and precise as possible. So we present in an appendix hereto a blue print taken from the reports of the Mississippi River Commission, upon which a line is drawn indicating approxi-

mately the stage at which the river begins to interfere with the construction of levees. The showing is for Carrollton, which is a few miles above New Orleans and a few miles below St. James Parish. The line was determined in the office of the Chief of Engineers of the War Department from reports of the Commission of the various dates when the river began to interfere with levee work. At Carrollton this interference began at stage 10. The hydrographs show that from 1872 to 1910 the river at Carrollton has never been above stage 10 during the months of August, September, October, and November, and only once during those years, and then only for a few days, in August, 1875, touched that stage.

But let it be as the Circuit Court said, and the resulting necessity is for dispatch in the prosecution of the work, not that the laborers engaged upon it shall work every day in excess of the hours limited by law.

What was to be done being known when the work was undertaken, dispatch in performance could be better secured by a sufficient force of men than by an insufficient force compelled to work excessive hours every day.

The court said (R., 5, 6):

\* \* \* it has always been usual that levee work proceed with the greatest despatch, and the labor of the day has never been restricted to eight hours.

In the nature of things, it is impossible to employ an unlimited number of men or teams in the building of levees, as no matter how

great a force the contractor may assemble, the work will not permit of crowding. It is necessary that levees be built in as short a time as possible, in order that they may settle as much as they can and that the grass may become well rooted upon them before they are called upon to bear the strain of a high river.

The court in this assumed as a matter of judicial knowledge that enough of men and teams can not be employed on the levees to properly expedite the work, unless they exceed eight hours of labor each day.

For such an assumption there is no warrant whatever. Two or even three shifts of men might be employed, for aught the court may have known, and the work proceed every hour of the twenty-four in a day and with men engaged upon it whose efficiency is not impaired by constant overwork.

As to labor conditions there is nothing in the record. We do not know how many men Garbish employed, nor how many he might have employed to advantage. We do not know whether he had one shift of men or more, and we know of nothing in the way of employing more than one shift.

The effect of the court's opinion is simply to except levee work comprehensively from the prohibitions of the statute, regardless of the labor conditions under which it is carried on.

The court also assumed as a matter of judicial knowledge that for a long, continuous period more hours of work per day by a man mean more work

done by him. Such an assumption is counter to human experience, and it is directly against the policy of American labor legislation.

That for a limited time, under the spur of a grave emergency, a man may do more in a day by working more hours is implied by the exceptions contained in all the statutes, State and Federal, which limit or prescribe the hours of labor in various callings. But the court implies that the stress and strain which a man may endure for a day he can as well endure through days and weeks and months, continuously, without reprieve or rest.

So the court justifies as a means of dispatch in the conduct of levee work what the experience of men as registered in their laws does not recognize as such.

There is but one fact assumed by the court and underlying its opinion, which was properly assumed, and that is that work on levees should not be delayed, but should be pushed with all diligence to completion, and this not because of any extraordinary emergency, but because of conditions usually and ordinarily, and indeed always, existing.

The work is one in which the Government is constantly engaged and for which Congress regularly makes appropriations, and as it was not excepted from the hours of labor in terms we must assume that there was no intention to except it, and also that the exception which the law does contain as to extraordinary emergencies has the same meaning when applied to levee work as when applied to public work of any other kind.

The extraordinary emergency contemplated by the law is what the term naturally imports, something suddenly and unexpectedly arising, calling for instant and strenuous action to prevent loss of life or destruction of property. It is something transient in its nature. If it is not met and the peril or injury it threatens averted, the consequences may be permanent, but the cause itself as a thing to be guarded against passes soon away. If it abides and becomes part of the established order it ceases to be an emergency, or at least ceases to be an extraordinary one.

The policy of State statutes prohibiting overtime upon public works is the same as that of the Federal statutes. In some of them it expressly appears that overtime is only authorized for the purpose of meeting a temporary situation.

Section 3922 of the Colorado Revised Statutes of 1908 provides:

Nothing in section 1 of this act shall be construed as to prevent work in excess of eight hours a day in emergency cases; *Provided*, That hours in excess of eight a day shall be treated as constituting part of a subsequent day's work; *And, provided*, That in no one week of seven days shall there be permitted more than forty-eight hours of labor.

It is obvious that if any considerable time was necessary to accomplish the emergency work in question the contractor would gain nothing by working his force overtime, since he can not average over eight hours a day for the six working days in a week.

Section 6575 of Remington and Ballinger's Codes and Statutes of Washington, edition of 1910, provides:

It is a part of the public policy of the state of Washington that all work "by contract or day labor done" for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each, except in cases of extraordinary emergency. No case of extraordinary emergency shall be construed to exist in any case where other labor can be found to take the place of labor which has already been employed for eight hours in any calendar day.

Section 1336, Compiled Laws of Utah, 1907, prohibits work in excess of eight hours a day upon public works "except in cases of emergency, where life or property is in imminent danger."

The act of May 6, 1909, ch. 292, Laws of New York, 1909, provides:

Each contract to which the State \* \* \* is a party \* \* \* shall contain a stipulation that no laborer \* \* \* shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood or danger to life or property.

The Massachusetts act of June 27, 1907, Supplement to Revised Laws of Massachusetts, 1902-1908, which relates to several occupations, provides (p. 829):

No laborer \* \* \* shall be requested or required to work more than eight hours in any one calendar day or more than forty-eight

hours in any one week, except in cases of extraordinary emergency. Only a case of danger to property, to life, to public safety or to public health shall be considered a case of extraordinary emergency within the meaning of this section.

Section 3827 of the General Statutes of Kansas, 1901 (Dassler), provides:

That eight hours shall constitute a day's work for all laborers [upon public works] \* \* \* except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life.

Section 4057, Compiled Laws of Oklahoma, 1909 (Snyder), contains the same provision.

Judicial decisions upon the statute are not abundant, but enough has been determined to put beyond question that no mere requirement of business convenience or pecuniary advantage is an "extraordinary emergency" within the meaning of the act.

In *Ellis v. United States*, 206 U. S., 246, 256, 257, this court had that question under consideration and disposed of it in the following manner:

In *Ellis's* case the plaintiff in error agreed to construct and complete pier No. 2 at the Boston Navy Yard, within six months, according to certain specifications and at a certain price. He found more difficulty than he expected, although he expected some trouble, in getting certain oak and pine piles called for by the



contract, and, having been delayed by that cause, he permitted his associate in the business to employ men for nine hours, in the hurry to get the work done. The judge instructed the jury that the evidence did not show an "extraordinary emergency" within the meaning of the act. The judge was right in ruling upon the matter. Even if, as in other instances, a nice case might be left to the jury, what emergencies are within the statute is merely a constituent element of a question of law, since the determination of that element determines the extent of the statutory prohibition and is material only to that end. The ruling was correct. It needs no argument to show that the disappointment of a contractor with regard to obtaining some of his materials, a matter which he knew involved some difficulty of which he took the risk, does not create such an emergency as is contemplated in the exception to the law. Again, the construction of the pier was desirable for the more convenient repair of warships, but it was not essential. Vessels had been docked without it since 1835 or 1836, so that there was no hot haste on that account, if under any circumstances that kind of need would have been enough (pp. 256, 257).

In *United States v. Sheridan-Kirk Contract Co.*, 149 Fed. Rep., 809, the work involved was the construction of a dam in the Ohio River, and the defendant contended, as the court ruled in the case at bar, that the entire work he had undertaken was emergency work of an extraordinary character and so within

the exception of the statute. The court, however, instructed the jury that—

“ \* \* \* The language ‘extraordinary emergency’ cannot contemplate conditions of danger which necessarily exist and inhere in the work to be done and which will always be present from the beginning to the end of the work. If the statute contemplated anything of that kind, I think different language would have been used to express it” (p. 814).

Upon motion for a new trial the court adhered to its previous ruling, saying (pp. 814, 816):

The words “extraordinary” and “emergency” are defined in the Century Dictionary as follows:

“Extraordinary: 1. Being beyond or out of the common order or rule; not of the usual, customary, or regular kind; not ordinary. 4. Exceeding the common degree or measure; hence, remarkable; uncommon; rare; wonderful.

“Emergency: 2. A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a perplexing contingency or complication of circumstances. 3. A sudden or unexpected occasion for action; exigency; pressing necessity.”

\* \* \* \* \*

\* \* \* The phrase “continuing extraordinary emergency” is self-contradictory. A condition or conditions which necessarily must continue for years cannot be called an uncommon, sudden, unexpected happening, which presents a sudden and unexpected occasion for action.

In the case at bar the emergency is not only a continuing one from the beginning to the end of the work, but was foreseen. The work to be done was not made necessary in the first instance by any accident or other unusual cause. It was work long foreseen, the time for doing it being determined by the Government as a matter of convenience in carrying out general plans of river improvement. The defendant knew the scope and nature of his undertaking, and made his stipulations and arrangements accordingly. If he was competent to do what he undertook, he knew how much work could be done by a stated number of men within a stated time, and unless some emergency arose while his work was under way, he could complete his work in proper time, without driving his men beyond eight hours a day, if he had made his calculations accordingly. No emergency of any kind did arise during the course of the work. The defendant simply disregarded the law. He required his men to work beyond the allotted hours, for no other reason apparent than that he thought he could thus get more done for the wage paid than by keeping within the law.

It is respectfully submitted that the judgment of the Circuit Court should be reversed.

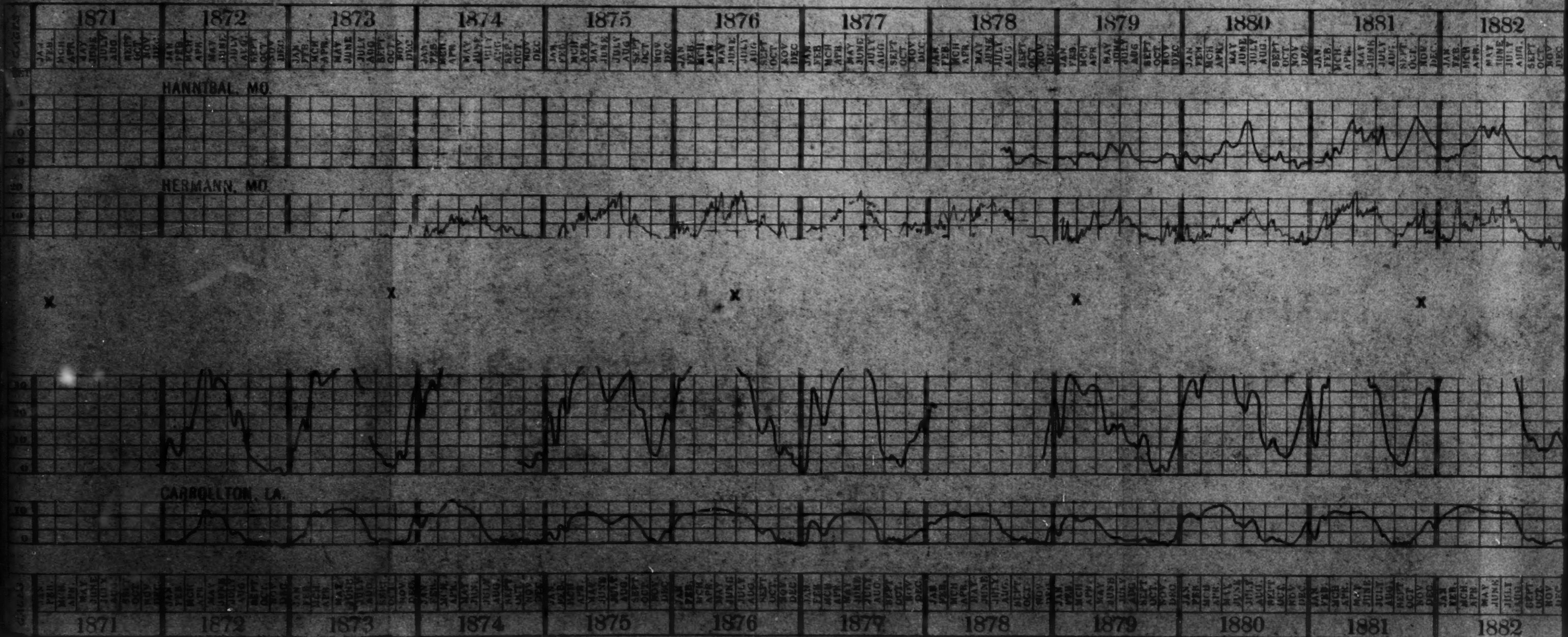
F. W. LEHMANN,  
*Solicitor General.*

JUNE, 1911.



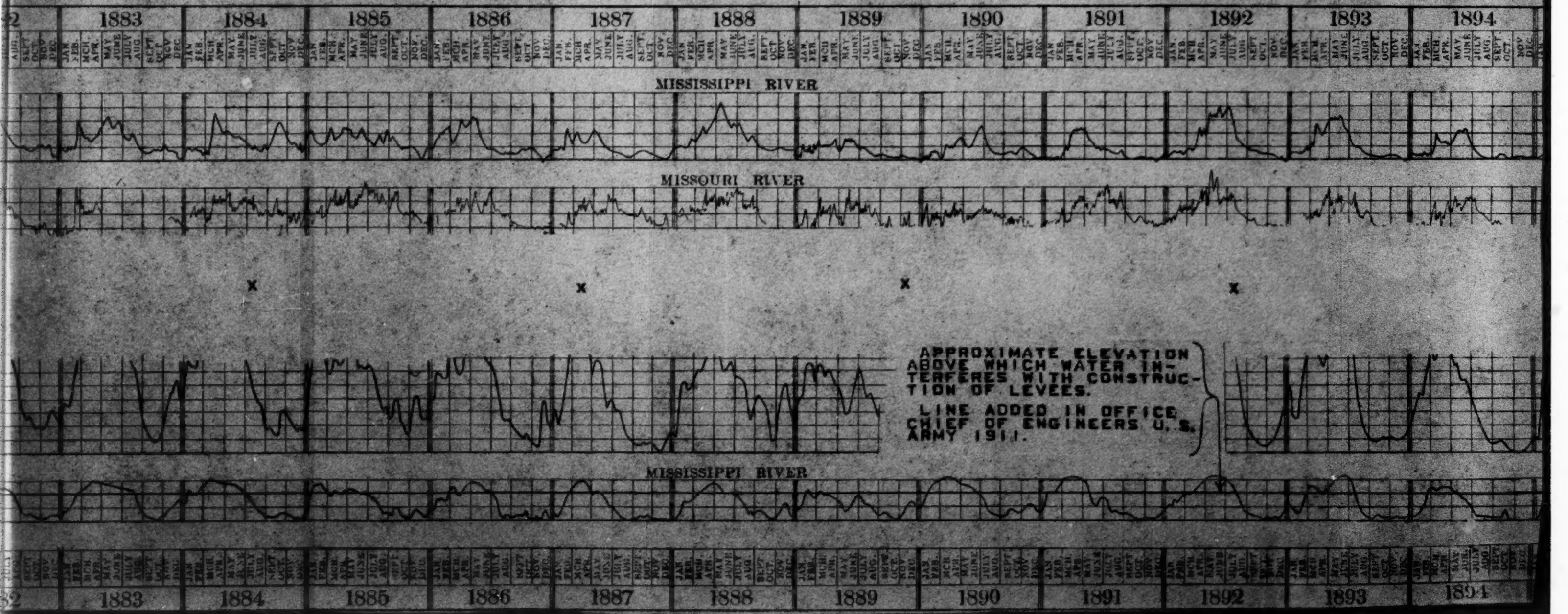


# HYDROGRA





# GRAPH OF THE MISSISSIPPI RIVER AND PRINCIPAL TRIBU





BUTARIES.

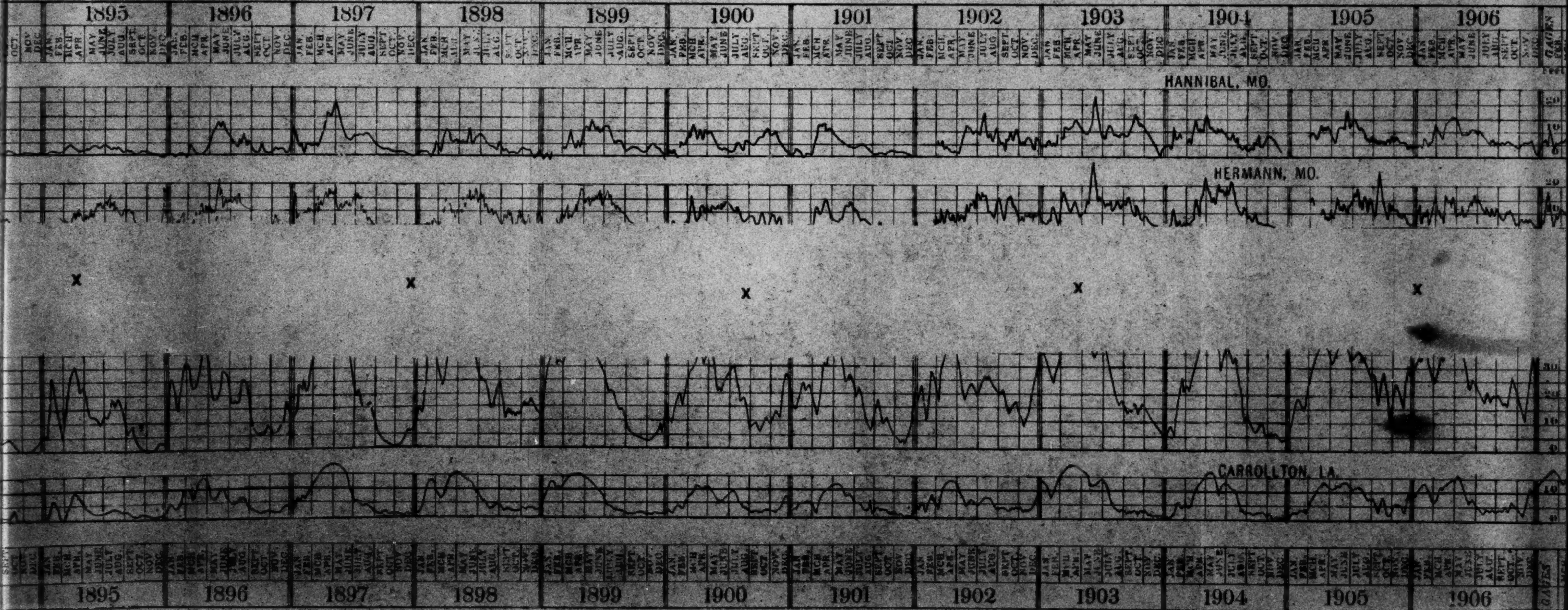
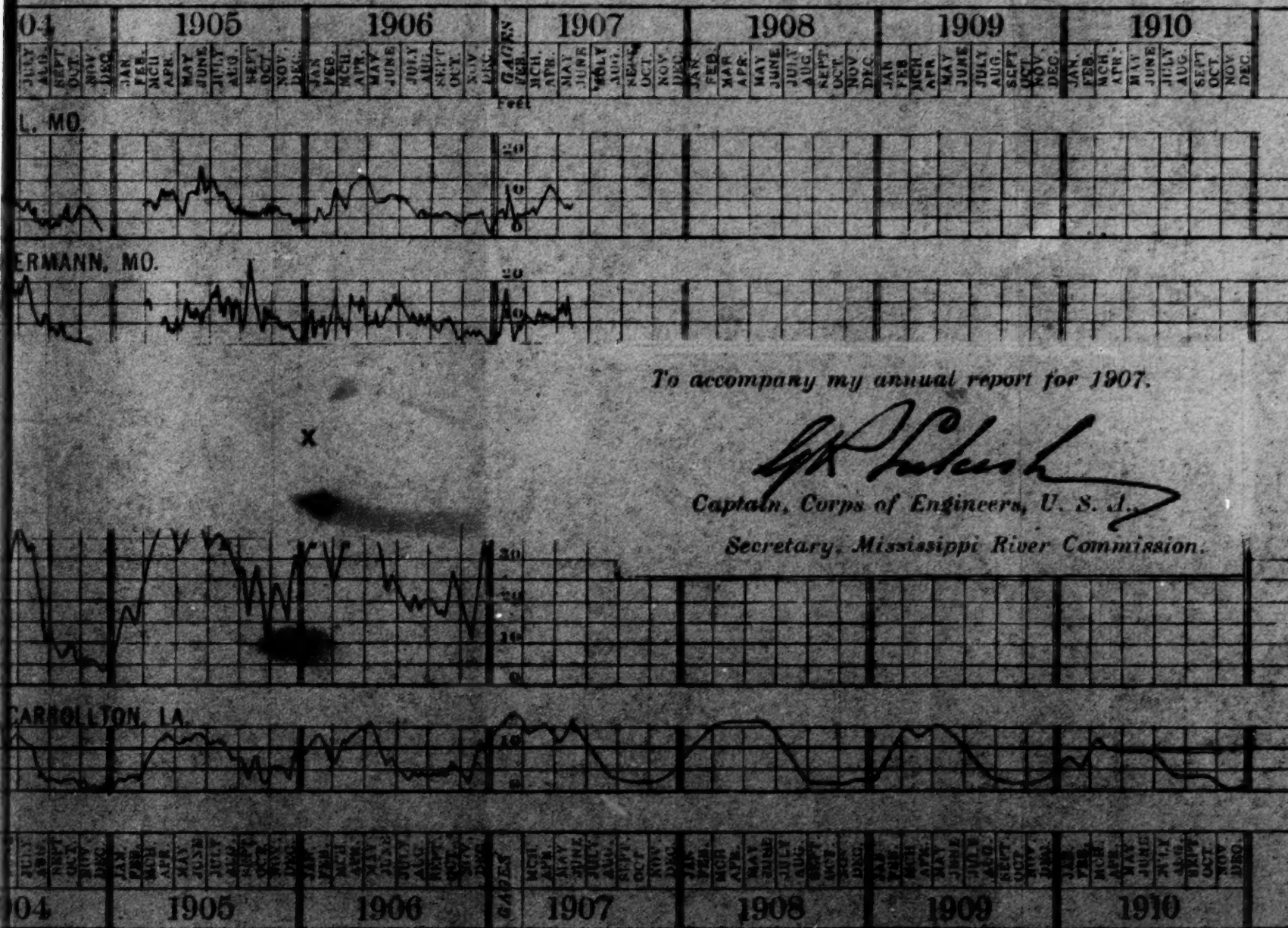




PLATE 1



E. Whitehead.

COMPREHENSIVE  
 HYDROGRAPH  
 OF THE  
 MISSISSIPPI RIVER  
 AND OF ITS  
 PRINCIPAL TRIBUTARIES.  
 1871 to 1907.

PREPARED UNDER THE DIRECTION OF

CAPTAIN G. R. LUKESH,

Corps of Engineers, U. S. A.,

SECRETARY MISSISSIPPI RIVER COMMISSION.

BY KIVAS TOLLY, ASSISTANT ENGINEER

ADDITIONS TO 1911 MADE IN OFFICE CHIEF OF ENGINEERS

—NOTE—

The gage curve for each place throughout the different years is referred to the present gage zero, whose elevation is given in the table below.

# Supreme Court of the United States.

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No. 655.

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THE UNITED STATES,  
Plaintiff in Error,  
*versus*

HERMAN F. GARBISH,  
Defendant in Error.

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BRIEF FOR DEFENDANT, APPELLEE.

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## I.

The defendant in this case was indicted for violation of the statute which forbids contractors on public works of the United States to permit laborers employed by them to work more than eight hours a day.

The indictment, after alleging that the defendant was a contractor upon public works of the United States—to wit, the building and construction of public levees upon the



banks of the Mississippi River in St. James Parish, Louisiana—proceeds to charge that the defendant

“did, unlawfully, wrongfully, intentionally, and knowingly, require and permit the laborers, whose services it was his, the said Garbish’s, duty to employ, direct, and control, and whose services were directed, employed, and controlled by him, the said Garbish, in the building and construction of said levee, which was then and there a part of the public works of the United States, to work more than eight hours in one calendar day, to wit, the 17th day of August, 1908, at a time and under circumstances when there was no extraordinary emergency, for the reason that at that season of the year, to wit, during the months of August, September, October, and November and December, the waters of the Mississippi River annually fall below the level of the surrounding land and are retained within the banks of said river without the necessity of any artificial levees, as was true on August 17, 1908, and for the further reason that the said Union levee, upon which the said work was permitted and required, was being constructed in the ordinary and usual course of levee building and improvements carried on annually by the Government of the United States for the increase in size and strength of such levees, in preparation for the high waters that come down the river; the existing levees in places being found of a standard sufficient in size and strength to withstand all usual yearly high stages of the water in the said river, but too low in size and strength to retain safely the unusually high waters that occasionally, although not every year, come down the Mississippi River, and it being the policy, rule, and custom of the United States Government to thus increase the standard of levees by destroying each year some of the inferior levees and replacing them with new and stronger and higher levees, year by year,

until the levees shall have all been brought to a standard able to withstand any unusual floods that may come down the river; and nothing unusual or out of the ordinary having required the destruction of the old levee on Union Plantation, or the building of this new levee, but same having been done for the reasons and pursuant to the policy aforesaid, and there, then and there, being the usual time for said contractors to complete said levee, so as to allow it time to settle and pack and become ready and able to serve the purposes for which it was constructed, namely, to withstand and retain the high waters of the Mississippi River before the usual annual rise of the waters in said river, and there, then and there, being the same, usual and customary time to so complete and perfect said Union levee, before the usual annual rise of the waters in said river, as would exist in the construction of any levee, on the said river any year and at any place and by any contractor, all of whom know, as did the said Garbish, that the waters of the Mississippi River annually fall and are retained within the natural banks thereof during the period or season aforesaid, and begin to rise above the natural banks thereof, and, therefore, to need artificial levees to retain them, in the month of January each year; contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States."

Tr., pp. 2, 3.

The defendant demurred to this indictment:

"That the said indictment does not set forth any offense against the laws of the United States, or any violation of the laws of the United States."

Tr., p. 3.

## II.

The Judge *a quo* sustained this demurrer, and gave written reasons for sustaining it. His opinion is as follows:

"In this case the defendant was indicted for an alleged violation of the act of August 1, 1892, known as the eight-hour law, and has interposed a general demurrer to the indictment, on the ground that it does not set forth an offense against the laws of the United States.

"The demurrer, of course, admits all the facts properly pleaded, but does not admit the correctness of either the inferences drawn from them by the pleader or his conclusions of law.

"Stripped of surplusage, the indictment charges that on August 17, 1908, the defendant, a contractor, was engaged in building certain public levees on the banks of the Mississippi River in the Parish of St. James, Louisiana, and required and permitted the laborers employed by him, and engaged in the said work, to work more than eight hours in one calendar day.

"The indictment further sets up that during the months of August, September, October, November and December the waters of the Mississippi River annually fall below the level of the surrounding land and are retained within its banks without the necessity of artificial levees; that the work was being done in the ordinary and usual course of levee building, by the Government of the United States in preparation for the high waters that annually come down the river; that the existing levee was not of sufficient size and strength and did not comply with the Gov-

ernment standard, and was being destroyed and replaced by the new, higher, and stronger levee; that nothing unusual or out of the ordinary had required the destruction of the old levee or the building of the new levee, and that the contractor had the usual time to complete the levee so as to allow it to settle and pack and become ready to withstand the next annual rise of the river.

"The defendant rests his case on the proposition that the building of levees on the Mississippi River in the Eastern District of Louisiana at all times presents an extraordinary emergency, and, hence that particular work is exempted from the operation of the law.

"This is denied by the Government, and the indictment contains the general averment that no extraordinary emergency existed.

"The question thus squarely presented is decisive of the case, if defendant's contention be sustained.

"The building of levees in Louisiana has at all times presented many problems. It is absolutely necessary, not only for the preservation of property and to permit the cultivation of the land, but to safeguard the very lives of the inhabitants as well, that levees should be built on the banks of the Mississippi River in this locality; therefore, it has always been usual that levee work proceed with the greatest dispatch, and the labor of the day has never been restricted to eight hours.

"In the nature of things, it is impossible to employ an unlimited number of men or teams in the building of levees, as, no matter how great a force the contractor may assemble, the work will not permit of crowding. It is necessary that levees be built in as short a time as possible, in order that they may

settle as much as they can, and that the grass may become well rooted upon them, before they are called upon to bear the strain of a high river.

"It is true that the months of August, September, October, November, and December are the most favorable for levee building, but there is no certainty that during any part of these months the river will maintain a low stage. When the river is bank-full, necessarily no levees can be built. Statistics of the river's height at New Orleans show that during the past twenty-five years the river has been bank-full on nearly every day of the year, and these statistics may well apply to the locality where the defendant was working. An unprecedented rain or an early freeze, followed by a thaw anywhere in the valley of the Mississippi River or its tributaries, might unexpectedly cause the river to rise at New Orleans. No one can foresee or anticipate the acts of nature, and who can say that a few days' more time, in which it might have become solidified, would not have so materially added to the levee's strength as to enable it to withstand the pressure, and without which it might signally fail.

"All of these facts are within the common knowledge of the people of this district, and, in connection with the specific allegations of fact in the indictment, overcome the mere conclusion of the pleader that no extraordinary emergency existed.

"The case presented here is not that of a contractor trying to complete his job on schedule time, nor is it a question of expediency or the saving of expense. In my opinion, the building of levees on the banks of the Mississippi River in the Eastern District of Louisiana presents at all times an extraordinary emergency.

"It may be that the indictment is otherwise demurrable, but I prefer to base my decision on the broad ground above set forth.

"The demurrer will be sustained and the defendant discharged."

Tr., pp. 4, 5, 6.

### III.

Thereupon the District Attorney appealed to this Court, and assigns as errors that the Court erred in sustaining the demurrer, and in not overruling and setting it aside; and,

#### "3.

"The Court erred in its construction of the statute upon which the indictment in this case is founded, and particularly in its construction of the words 'extraordinary emergency,' used in such statute, and in holding, under its erroneous construction of these words, that the indictment on its face does not show an absence of 'extraordinary emergency.'

#### "4.

"The Court erred in its construction of the statute upon which this indictment is founded, and particularly in its construction of the words 'extraordinary emergency,' as used in said statute, and in not holding that the facts set forth in the indictment in this case showed, under a proper construction of the statute and the words 'extraordinary emergency' as

used therein, the commission of a criminal violation by the defendant of the said statute; and, further, in not holding that the facts set forth in the indictment in this case showed that there was no 'extraordinary emergency,' as intended by the said statute, and such as to excuse the defendant for permitting, requiring, and directing the laborers employed by him and under his control to work more than eight hours in one calendar day."

Tr., pp. 7, 8.

#### IV.

The decision in this case turns upon the meaning that should be given to the words "*except in case of extraordinary emergency*," in the statute. The statute forbids a contractor to require or allow the laborers whom he employs to work more than eight hours a day in one calendar day, "*except in case of extraordinary emergency*." The Prosecuting Attorney contends, in substance, that these words mean "unless an extraordinary emergency arises or occurs." The defendant, on the other hand, contends that both the wording of the statute and its reason and purpose show that it intended to embrace, not only contingencies arising during the performance of the contract, and definitely threatening to interfere with or prevent that performance, but also cases in which the contract itself is made under such conditions that certain facts may at any time, and frequently do, occur, so as to prevent the possibility of any performance of the contract so as to be of any use. In cases of this kind the defendant insists that the entire con-

tract is performed, from start to finish, under the "*extraordinary emergency*" contemplated by the statute.

For we think it clear that the words "*extraordinary emergency*" can mean no more than the existence of conditions not ordinarily met which affect the performance of the contract, and may prevent it altogether. Can it make any difference, in the application of the statute, whether the contract is made in the presence of, and therefore with implied reference to, the existence of such conditions, or whether these conditions do not exist at the time the contract is made, but occur subsequently?

The words used in the exception to the application of the statute seem clearly to indicate that the exception contemplates both cases. Those words are "*in case of extraordinary emergency*," not "*upon the occurrence of extraordinary emergency*." The existence, before the contract is made, of conditions which may arrest or prevent the performance of the contract is a *case* of "*extraordinary emergency*" in as true a sense as their occurrence after the contract is made. In either event, the parties to the contract are alike confronted with a case of extraordinary emergency, and the eight-hour labor law does not, we submit, apply.

For, if this be not the meaning of the statute, the Government will be deprived of the power to make effective and useful contracts under conditions of emergency—contracts which, from the nature of things, require extraordinary exertions, if there is to be any assurance of accomplishing their object.

The work of levee-building is pre-eminently a work of this character. The contract is let in the early part of the year so as to give the contractor the chance of the utmost possible time for the work. It is expected that he will get



to work in August, but the river may not have fallen sufficiently by that time to permit him to work; or there may be continuous rains, rendering work impossible; or a long-continued drought may have baked the ground nearly as hard as brick, and so make the progress of the work exceedingly slow. Then the December rise may come early and stop the work before it is completed. Should any of these contingencies happen, not only is the work done destroyed, but the lives and property of many people are also exposed to destruction.

To say to the contractor that he may employ a double shift of laborers, and so comply with the law, would be a mockery. The levees in Louisiana are built in what would be considered in the North, East and near West as sparsely-settled country, where the supply of labor is scant and unreliable. They are also built at the season of the year when there is the greatest demand and the keenest competition for such labor as is available in moving the sugar and rice and cotton crops.

The Judge *a quo*, taking judicial notice of the conditions, which are known by every man in Louisiana to exist, and which even his judicial position could not erase from his mind, held that the eight-hour-labor law did not apply to contracts for building levees, and, therefore, sustained the demurrer.

We believe he was right, and that this Honorable Court will sustain his judgment.

Respectfully submitted,

E. D. SAUNDERS,

*Attorney for Defendant.*